

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(94) 214 final

Brussels, 15.06.1994

94/0146 (CNS)

Proposal for a
COUNCIL REGULATION (EC, Euratom)
on protection of the Community's financial interests

Proposal for
COUNCIL OF THE EUROPEAN UNION ACT
establishing a Convention for the protection of the Communities' financial interests

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. Introduction

The protection of the Community's financial interests ranks high among the institutions' priorities. Action began in the 1970s, with presentation by the Commission of a draft Treaty for the legal protection of the Community's financial interests in 1976. Since the late 1980s, closer attention has been paid to the question of legal protection under both Community law and national law.

The Council (Justice) passed a Resolution on 13 November 1991 stating that "cooperation between the Member States in the prevention and combating of fraudulent practices by which harm is done to the financial interests of the Communities is enhanced by a compatibility of norms in the legal and administrative provisions of the Member States by which such conduct is sanctioned" and requesting the Commission to "conduct, as soon as possible, a comparative law study of the abovementioned legal and administrative provisions of the Member States, in order to see whether action should be taken to achieve greater compatibility of these provisions".

The Commission of its own motion undertook a parallel comparative law study on the systems of administrative and criminal penalties of the Member States and on the general principles applicable to Community administrative penalties. The two studies revealed the need for remedial legislative action in both areas. The Commission transmitted the findings of the studies to the Council and Parliament in June 1993.

Endeavours to protect the Community's financial interests against fraud are now given direct expression in the new Article 209a EC, inserted by the Treaty on European Union, and in Title VI of the Union Treaty (justice and home affairs cooperation). Article 209a is broadly inspired by the judgment given by the Court of Justice in Case 68/88 (on 21 September 1989) which spells out the obligations of the Member States to protect the Community's financial interests in the same way as their own financial interests and to provide for penalties that are effective, proportionate and dissuasive.

On 27 October 1992 the Court of Justice gave judgment in Case C-240/90 expressly acknowledging the Commission's power to impose administrative penalties in the exercise of its powers to enact Regulations for the common organization of agricultural markets.

2. Legal framework for the Commission's initiative

The Resolution on the independent power of investigation and inquiry which the Union may exercise for the legal protection of its financial interests, passed by the European Parliament on a motion from its Committee on Budgetary Control in March 1994, calls on the Commission to make proposals based on Articles 100 and 209a EC in 1994 relating both to the principles governing Community administrative penalties and to protection by national criminal law of the Community's financial interests against fraud.

In March 1994 the United Kingdom presented a draft for joint action under Title VI.

The Commission believes that measures must be taken at both Community and national levels if they are to be successful.

Article 6 requires Member States to ensure that infringements are penalized in the same way as infringements of national law. Broadly speaking this restates the principle of Article 209a EC, adding to it the concepts of effectiveness, proportionality and dissuasiveness enunciated by the Court of Justice in Case 68/88.

Article 7 describes the types of administrative penalties that may be imposed for infringements of Community law.

Article 8 determines who may be liable to the penalties.

Article 9 prescribes limitation periods for both proceedings and enforcement. National rules currently diverge quite widely; the effect of the Regulation would be to achieve a degree of harmonization here.

Article 10 applies the very important nullum crimen sine lege rule to the specific context of Community administrative penalties. It also deals with some specific aspects of retroactivity.

Article 11 is to regulate checks and inspections in the Community budget context. It provides that procedures will depend on the legislation applicable to the specific area concerned, but the Regulation would permit checks and inspections to be performed by properly empowered agents.

The Commission's rights of access to premises with the assistance of the Member States are also determined in general terms.

4. The draft Convention

Article 1 defines fraud against the Communities' financial interests and what it consists of. The effect would be that a single, uniform offence of fraud against the Communities' financial interests would exist in the legislation of all Member States.

Article 2 brings attempts within the definition.

Article 3 determines the liability of both natural and legal persons. Among other things, liability can attach to persons who are not personally liable but exercise authority within a business.

Article 4 determines the penalties that may be applied for fraud against the Community budget and outlines a scale. It specifies what will constitute aggravating circumstances. The reference to conspiracy is not so much to a specific concept of criminal law as simply to fraud committed by organized crime.

Article 5 establishes rules of jurisdiction in multi-State fraud cases. The basic rule that jurisdiction lies with the Member State in which the main acts constituting the fraud were done will need to be amplified by subsequent implementing rules.

Article 6 provides for frauds committed in non-member countries to be treated as fraud committed within the Community where the benefit of the fraud was or could have been obtained in or transferred to a Member State's territory, where the perpetrator is a national of a Member State or where acts conducive to the commission of the fraud were done in the territory of a Member State.

Articles 7 and 8 deal with extradition, proceedings, limitation and judicial assistance, these being matters to which the Commission's right of initiative does not extend. Provisions are proposed in footnotes as material for reflection offered by the Commission.

Proposal for a
COUNCIL REGULATION (EC, Euratom)
on protection of the Community's financial interests

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 235 thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 203 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Whereas the general budget is financed by the Communities' own resources and administered by the Commission within the limit of the appropriations authorized and in accordance with principles of sound financial management; whereas the Commission works in close cooperation with the Member States to that end;

Whereas more than half of Community expenditure is paid to final beneficiaries by the Member States;

Whereas detailed rules governing the decentralized administration of Community resources and the monitoring of their use are laid down separately for individual Community policy areas; whereas acts detrimental to the Communities' financial interests must be countered in all areas, including those not financed from the Community budget itself;

Whereas, in order to make measures to counter fraud more effective, a common set of legal rules should be enacted for all areas of Community policy; whereas the categories of irregularities affecting the Communities' financial interests and the measures to be taken to counter them should be defined;

Whereas Community law already imposes administrative penalties in relation to the common agricultural policy; whereas such penalties should be extended to other areas;

Whereas administrative penalties imposed by the authorities of the Member States should be imposed on uniform terms in order to ensure effective protection of the Communities' financial interests;

Whereas it is necessary to establish the general principles governing Community administrative penalties, notably as regards the limitation ratione temporis and the non-retroactivity of provisions for penalties, without prejudice to express derogations in specific instruments providing for them;

Whereas Community law imposes on the Commission and the Member States an obligation to check that Community budget resources are used exclusively for their intended purpose; whereas there is a need for common rules to supplement existing provisions;

Whereas, although the Treaties confer powers to enact provisions for checks and penalties in relation to revenue and expenditure in specific areas, they do not confer powers to enact horizontal provisions applicable to revenue and expenditure in general terms, and whereas the application of Article 235 of the EC Treaty and Article 203 of the EAEC Treaty is justified,

Article 4

1. As a general rule, where an irregularity is committed neither intentionally nor negligently, the following measures may be applied:
 - withdrawal of a benefit unjustifiably received;
 - the obligation to pay or reimburse amounts due or unjustifiably received, plus, where appropriate, interest which may be fixed at a flat rate;
 - the forfeiture of the whole or a part of a guarantee lodged in support of an application for a benefit or for the receipt of an advance.

Such measures shall not be treated as penalties.

2. However, even where an irregularity is committed neither intentionally nor negligently, Community administrative penalties may be applied if, to ensure its correct functioning, the rules in question provide for the imposition of penalties regardless of the element of fault.

Article 5

Where an irregularity is committed intentionally or negligently, the Member States or the Commission, as the case may be, shall impose such Community administrative penalties as are provided for by Community legislation in addition to the measures provided for by Article 4(1).

Article 6

The measures provided for by Articles 4 and 5 shall apply without prejudice to the Member States' obligation to ensure that infringements of Community law are penalized by appropriate measures under their national law and under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and gravity and which, in any event, afford effective, proportionate and dissuasive protection for the Communities' financial interests.

TITLE II

RULES APPLICABLE TO COMMUNITY ADMINISTRATIVE PENALTIES

Article 7

1. "Community administrative penalties" means all enforcement measures provided by Community legislation to be taken in the event of conduct to which Article 5 applies which entail unfavourable financial or economic consequences for natural or legal persons to whom Article 8 applies.

Provision may be made in particular for the following penalties:

- an administrative financial penalty, including the obligation to pay an amount greater than the amounts unjustifiably received or evaded, plus interest where appropriate;
- withdrawal of the whole or a part of the benefit granted by Community legislation, even if only part of this benefit has been unjustifiably received;
- ineligibility for or withdrawal of the benefit for a period subsequent to that affected by the irregularity;
- temporary or permanent withdrawal of approval or recognition, if any, needed for eligibility for a scheme of Community aid.

2. The nature and frequency of the checks and inspections and the procedure for performing them shall be determined in such a way as to ensure effective and uniform application of the material legislation and in particular to allow irregularities to be prevented and detected. Measures providing for checks and inspections shall as far as possible take account of the existing administrative practice and structures in the Member States and shall be determined so as not to entail excessive economic constraints or administrative costs.
3. Checks and inspections performed by the Commission in the exercise of powers conferred on it by specific Community legislation shall be performed by its own staff or by experts duly empowered to act on its behalf. These persons shall be given access to full information, including information obtained by national inspectors, and shall be entitled to take copies of documents, subject to rules of confidentiality applying to judicial proceedings.

All information obtained in the course of the checks or inspections referred to in the first subparagraph shall be subject to business secrecy. It may not be divulged to any persons other than those whose functions give them access to it, nor used for any purposes other than those specified in paragraph 2.

4. Checks and inspections shall be permitted and access to land, premises, means of transport and other places to be visited for the purpose shall be allowed by all natural or legal persons who:
 - enjoy a financial benefit, whether directly or indirectly;
 - are subject to obligations imposed by Community legislation;
 - are parties, directly or indirectly, to operations to which the relevant legislation applies, whether as suppliers, successive consignees, carriers or processors, managers, coordinators or in any other capacity.
5. Where persons to whom paragraph 4 applies refuse to permit checks or inspections to be made, the Member State concerned shall, in accordance with its national procedural rules, provide the Commission staff or experts duly empowered to act on its behalf with such assistance as they may require to enable them to take the measures necessary in order to perform the checks or inspections entrusted to them.

Article 12

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Communities.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Council
The President

Whereas⁽³⁾

1. Has decided to establish the Convention attached hereto, which has been signed this day by the Representatives of the Governments of the Member States of the Union.
2. Recommends the Member States to adopt the Convention in accordance with their respective constitutional requirements.
3. Calls upon the Member States to lodge with the General Secretariat of the Council their instruments recording the completion of the procedures required by their constitutional rules for the adoption of the Convention.
4. Requests the Secretary-General of the Council to inform the Member States of the date of entry into force of the Convention.

Done at Brussels,

For the Council
The President

⁽³⁾ See footnote to Title III of the Convention - Judicial cooperation between Member States.

Whereas rules should be laid down to govern jurisdiction, the commencement of proceedings, extradition and mutual assistance, since the conventions concluded hitherto for mutual assistance in criminal matters are not applicable in all the Member States and do not achieve all that is necessary for the protection of the Communities' financial interests; and whereas the Member States bear the primary responsibility for detecting, prosecuting and penalizing fraud against the Communities' financial interests.

HAVE AGREED AS FOLLOWS:

TITLE I - GENERAL PROVISIONS

Article 1 - Definition of the offence of fraud

1. There shall be a specific offence of fraud against the Communities' financial interests.
2. "Fraud against the Communities' financial interests" means any act or omission contrary to Community law committed either intentionally or through gross negligence in respect of a duty of care, which has as its object or effect:
 - a diminution of the Communities' own resources or other revenue; or
 - the misappropriation, wrongful retention or misapplication of monies paid by the Communities.
3. Fraud against the Communities' financial interests shall apply both to revenue and expenditure provided for by the general budget and to all other revenue and expenditure managed by or on behalf of a Community institution.
4. Fraud against the Communities' financial interests includes the following acts:
 - the preparation, supply, use or presentation of false, incorrect or incomplete documents or statements where information is to be furnished prior to the grant of a subsidy or the receipt of monies;
 - failure to furnish information to the relevant authorities in relation to any change in the circumstances giving rise to the grant of a subsidy or the receipt of monies;
 - misappropriation or dissipation of funds;
 - knowingly using aid or subsidies obtained on the basis of incorrect or incomplete statements or other misleading acts.

Article 2 - Attempts

An attempt to commit fraud against the Communities' financial interests shall be punishable in the same way as the full commission thereof.

Article 3 - Liability

1. Any person who is a party to fraud against the Communities' financial interests may be held liable as principal offender, instigator, accomplice or receiver of stolen goods.
2. Any person who exercises legal, delegated or de facto powers within a business may be held liable for a fraud against the Communities' financial interests committed by a member of the undertaking on its behalf.
3. Any legal person shall be liable, at least to financial penalties, for any fraud against the Communities' financial interests committed by any body, legal agent or person enjoying decision-making powers, whether in law or in fact, on its behalf.
4. The heads of liability under paragraphs 1 to 3 shall not be mutually exclusive.

TITLE III - JUDICIAL COOPERATION BETWEEN MEMBER STATES⁽⁹⁾

Article 7 - Extradition, prosecution and limitation⁽⁹⁾

⁽⁹⁾ Title III is not within the scope of the Commission's initiative under Article K.3(2) of the Union Treaty. It is presented to the Council as material for reflection so as to offer a full document.

⁽⁹⁾ Article 7

1. Member States shall, in accordance with the procedures laid down by the extradition treaties and agreements to which they are parties, extradite a person against whom proceedings have been commenced by the requesting Member State where the act or acts of which he is accused constitute or may constitute fraud against the Communities' financial interests.

Extradition shall not be refused solely on the ground that the offence is a fiscal offence, or because double criminality is a precondition.

Member States shall extradite sought for the purpose of enforcement of a criminal penalty or preventive measure imposed for fraud against the Communities' financial interests.

2. If the Member State in whose territory the suspected offender resides or is arrested declines to extradite him on the ground that he is a national, that Member State shall submit the case to its competent authorities in order that proceedings may be brought if they are considered appropriate. For this purpose, it shall request the transfer of proceedings from the Member State having jurisdiction in the first instance.

That Member State shall then treat the fraud as having been committed in its own territory.

3. Any event which suspends limitation periods in the applicant Member State shall have like effect in the Member State applied to, and vice versa.